
YALE LAW & POLICY REVIEW

Code Dodgers: Landlord Use of LLCs and Housing Code Enforcement

*By James Horner**

In depressed real estate markets across the United States, landlords are placing each of their properties in separate LLCs. Their aim in doing so is to avoid the full brunt of housing code enforcement by limiting their exposure to potential fines. The increasing prevalence of single-property LLCs has significant, negative consequences for low-income tenants. First, their buildings are less likely to be well maintained. Additionally, in certain circumstances, a single-property LLC strategy enables landlords to use superior bargaining power to extract enormous profits from tenants in dilapidated properties. Then, when the property accumulates too many fines, landlords can simply walk away from the buildings. This, in turn, increases blight and reduces the affordable housing stock in a city. Current legal schemes—such as typical housing codes, criminal penalties, and consumer protections—do not adequately address this problem. Instead, this Note recommends that local governments pursue a policy of limited corporate veil piercing for landlords based on ERISA’s common control liability provisions. This scheme would prevent landlords from evading full liability for housing code violations.

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INTRODUCTION

The United States is mired in an affordable housing crisis. Across the country, low-income families are struggling to pay the rent, and evictions are reaching epidemic percentages.¹ The supply of affordable housing in the United States dropped by a staggering 60% from 2010 to 2016 due to a combination of rent increases, stagnant wages, and lack of government support for affordable housing.² Median rents rose by 32% from 2001 to

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1. Emily Badger & Quoc Trung Bui, *In 83 Million Eviction Records, a Sweeping and Intimate New Look at Housing in America*, N.Y. TIMES (Apr. 7, 2018), <http://www.nytimes.com/interactive/2018/04/07/upshot/millions-of-eviction-records-a-sweeping-new-look-at-housing-in-america.html?login=email> [http://perma.cc/5BUJ-GEQY]. See generally MATTHEW DESMOND, EVICTED (2016) (study of evictions in Milwaukee). In New Haven, CT, the eviction rate (rate of evictions per 100 households) has skyrocketed from 1.65% in 2001 to 4.05% in 2016. *Eviction Lab*, PRINCETON UNIVERSITY, <http://evictionlab.org/map/#/2016?geography=cities&bounds=-73.256,41.167,-72.61,41.409&locations=0952000,-72.924,41.311> [http://perma.cc/35YM-HHWY] (*last visited* Apr. 1, 2019).
 2. Tracy Jan, *America's Affordable-Housing Stock Dropped by 60 Percent from 2010 to 2016*, WASH. POST (Oct. 23, 2017), http://www.washingtonpost.com/news/wonk/wp/2017/10/23/americas-affordable-housing-stock-dropped-by-60-percent-from-2010-to-2016/?utm_term=.a2b87f86ca7d [https://perma.cc/RH9Q-KLCJ] (citing *Rental Affordability is Worsening*, FREDDIE MAC MULTIFAMILY 1 (Oct. 23, 2017), http://mf.freddiemac.com/docs/rental_affordability_worsening.pdf [http://perma.cc/KV32-68PK]).

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2015.³ As a result, minimum-wage workers now cannot afford a one-bedroom apartment in over 99% of the nation's counties.⁴ Nationwide, about 52% of households below the poverty line spent at least half of their income on housing in 2013, up from 42% in 1991.⁵ In addition, almost one quarter of households below the poverty line in 2015 devoted an astounding 70% or more of their income to housing.⁶ In 2015, the United States Department of Housing and Urban Development (HUD) found that the number of what it classifies as "worst case housing needs" households had increased by roughly 7.5% over the previous two years and was 40% higher than it was at the beginning of the recession in 2008.⁷ The situation seems to only get worse. HUD recently announced plans to cut federal rent subsidies to low-income renters, while a major tax credit that incentivizes affordable housing construction is in danger of lapsing.⁸

Housing conditions are also poor. In 2015, the Census Bureau classified over 3.7 million rental units, representing 8.5% of all rental housing, as "moderately or severely inadequate."⁹ To receive one of those

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3. Glenn Thrush, *As Affordable Housing Crisis Grows, HUD Sits on the Sidelines*, N.Y. TIMES (July 27, 2018), <http://www.nytimes.com/2018/07/27/us/politics/hud-affordable-housing-crisis.html?action=click&contentCollection=todayspaper®ion=rank&module=package&version=highlights&contentPlacement=2&pgtype=collection> [<http://perma.cc/D2SR-PYBV>].
 4. *Id.*
 5. Matthew Desmond, *Unaffordable America: Poverty, housing, and eviction*, INST. FOR RESEARCH ON POVERTY, UNIV. OF WISCONSIN-MADISON 1 (Mar. 2015), <http://www.irp.wisc.edu/publications/fastfocus/pdfs/FF22-2015.pdf> [<http://perma.cc/5BF5-GCQ2>].
 6. *Id.*
 7. OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., *Worst Case Housing Needs: 2017 Report to Congress 2* (2017), <http://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs.pdf> [<http://perma.cc/Q33K-8G6T>]. A household is categorized as having "worst case housing needs" if it: 1. is below 50% of the Area Median Income and pays at least half of its income for rent or; 2. lives in severely inadequate housing.
 8. Thrush, *supra* note 3.
 9. U.S. CENSUS BUREAU, 2015 AMERICAN HOUSING SURVEY, http://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html#?s_areas=a00000&s_year=n2015&s_tableName=Table1&s_byGroup1=a2&s_byGroup2=a10&s_filterGroup1=t1&s_filterGroup2=g1&s_show=S [<https://perma.cc/E8XH-QVKA>].

classifications, a unit had to have experienced serious issues with plumbing, heating, electricity, or upkeep (e.g., holes in the wall, rat infestations, etc.).¹⁰ About 12% of rental units occupied by households below the poverty line were “inadequate.”¹¹

The downside of living in a poorly maintained unit is much more than cosmetic. The connection between poor housing conditions and maladies such as lead poisoning, asthma, and other respiratory issues is well known, especially for children and the elderly.¹² Studies have also linked substandard housing to heart disease, childhood development issues, neurological disorders, and other mental health issues.¹³

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10. See U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2015, A-12-A-13 (2015), <http://www2.census.gov/programs-surveys/ahs/2015/2015%20AHS%20Definitions.pdf> [<http://perma.cc/ZE6Q-BDAM>]. To be severely inadequate, a unit has to either lack cold and warm running water, lack its own full bathroom, have a heating breakdown, lack electricity, or have various electrical problems, such as exposed wirings, a lack of outlets, or repeatedly blown fuses. A unit may also be categorized as severely inadequate by having at least five of the following upkeep problems: outside water leaks in the past twelve months; inside water leaks in the past twelve months; holes in the floor; open cracks; an area of peeling paint larger than a standard piece of office paper; rats in the past twelve months. A unit is moderately inadequate if it has at least three of the upkeep problems listed above. Alternatively, a unit is moderately inadequate if had two toilet breakdowns in the last three months that lasted longer than six hours; the unit is heated only by an unvented kerosene, oil, or gas burning stove; or the unit lacks a sink, refrigerator, cooking equipment, or its own kitchen.
 11. See *supra* note 9.
 12. See, e.g., Samiya A. Bashir, *Home is Where the Harm Is: Inadequate Housing as a Public Health Crisis*, 92 AMERICAN J. PUB. HEALTH 733 (2002); Lauren Taylor, *Housing and Health: An Overview of the Literature*, HEALTH AFF 2-3 (June 7, 2018), http://www.healthaffairs.org/doi/10.1377/hpb20180313.396577/full/HPB_2018_RWJF_01_W.pdf [<http://perma.cc/7CHF-87TP>].
 13. See *id.*; see also Gary W. Evans, Nancy M. Wells & Annie Moch, *Housing and Mental Health: A Review of the Evidence and a Methodological and Conceptual Critique*, 59 J. SOC. ISSUES 475 (2003); James Krieger & Donna L. Higgins, *Housing and Health: Time for Public Health Action*, 92 AM. J. PUB. HEALTH 758 (2002); Rebekah Levine Coley et al., *Poor Quality Housing Is Tied to Children’s Emotional and Behavioral Problems*, MACARTHUR FOUND. (Sept. 2013), http://www.macfound.org/media/files/HHM_-_Poor_Quality_Housing_Is_Tied_to_Childrens_Emotional_and_Behavioral_Problems.pdf [<http://perma.cc/E5QC-W6B9>].

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Much of the legal academy's response to this latest housing crisis has focused on the travails tenants face in housing court, cutbacks in rent control, reductions in the social safety net, and the rise of exclusionary zoning.¹⁴ One critical area that has received less attention is corporate law, and, specifically, landlords' use of the Limited Liability Corporation (LLC). An LLC is a relatively recently corporate form that combines the liability protection of a traditional corporation with pass-through tax treatment.¹⁵ A traditional corporation insulates shareholders from liabilities incurred by the business, but the corporate form comes with the cost of an extra tax on corporate income. An LLC keeps the liability protection but eliminates the additional tax burden.¹⁶ LLCs are also easy to set up and have light reporting and recordkeeping requirements.¹⁷ Landlord use of LLCs has become an increasingly common practice in the past couple decades.¹⁸ This trend has recently garnered attention after journalists revealed that Fox News host Sean Hannity had a secret real estate empire hidden behind a maze of single-property corporate entities. Articles by those journalists

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14. See Lisa T. Alexander, *Evicted: The Socio-Legal Case for the Right to Housing*, 126 YALE L.J. F. 431 (2017); Laurie Ball Cooper, *Legal Responses to the Crisis of Forced Moves Illustrated in Evicted*, 126 YALE L.J. F. 448 (2017); Ezra Rosser, *Exploiting the Poor: Housing, Markets, and Vulnerability*, 126 YALE L.J. F. 458 (2017); David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78 (2017).
 15. JONATHAN R. MACEY, DOUGLAS K. MOLL & ROBERT W. HAMILTON, *THE LAW OF BUSINESS ORGANIZATIONS* 911-12 (13th ed. 2017). For example, Connecticut enacted its first LLC law in 1993. Connecticut Limited Liability Company Act, Pub. Act No. 93-267, 1993 Conn. Acts 884 (Reg. Sess.).
 16. MACEY, MOLL & HAMILTON, *supra* note 15, at 911-12.
 17. Emily Badger, *Anonymous Owner, L.L.C.: Why It Has Become So Easy to Hide in the Housing Market*, N.Y. TIMES (Apr. 30, 2018), <http://www.nytimes.com/2018/04/30/upshot/anonymous-owner-llc-why-it-has-become-so-easy-to-hide-in-the-housing-market.html> [<http://perma.cc/BU9U-B2H4>].
 18. Guides and advice articles for landlords typically recommend using LLCs. See, e.g., Laura Agadoni, *Should Landlords Set Up an LLC for a Rental Property?*, LANDLORDOLOGY (Sept. 6, 2017), <http://www.landlordology.com/landlord-rental-llc-limited-liability-company> [<http://perma.cc/65HE-WFCC>]; Stephane Fitch, *Attention Landlords: Beware Litigious Tenants*, FORBES (Aug. 26, 2009, 2:00 PM), <http://www.forbes.com/2009/08/26/rental-property-liability-personal-finance-landlord.html#199a511b7e34> [<http://perma.cc/MQL2-BPJU>] (“[Y]ou’ll find that putting an investment property into an LLC is routine.”).

have mainly focused on how landlords use LLCs to conceal their identity and avoid public scrutiny.¹⁹

This Note will instead focus on how, in depressed real estate markets, landlords have placed each of their properties in a separate LLC to avoid the full brunt of housing code enforcement. The focus on this issue was in large part prompted by Matthew Desmond's landmark study of eviction in Milwaukee, *Evicted*.²⁰ Though it is not a main focus of that work, Desmond sheds light on how landlord LLC use can inhibit full housing code enforcement.²¹ This Note seeks to build off his work by more fully exploring the incentives and consequences related to these practices, as well as by proposing a policy solution.

In Part I, this Note will address the nature of the problem by explaining why it is particularly advantageous for landlords in low-value real estate markets to use this strategy and the negative impacts for low-income housing. LLC use not only weakens the incentives for landlords to maintain their properties, but also allows landlords to engage in strategic defaults on their properties when fines are large in relation to property values. This dynamic shrinks the affordable housing stock and increases the bargaining power of landlords over tenants. In Part II, this Note will survey how some jurisdictions have attempted to mitigate the effects of landlord LLC use and explain why their approaches are inadequate. In Part III, this Note will propose a policy solution of limited corporate veil piercing based on ERISA's common control liability provisions.

I. LANDLORD LLC USE AND ITS CONSEQUENCES

While the private, if not secretive, nature of the LLC can make it difficult to determine the scope and impact of this problem conclusively, existing data suggest it is significant in American cities with struggling housing markets. In one representative, highly studied city, Milwaukee, the *Journal Sentinel* published a series of articles focusing on the obstacles that landlord LLC use poses to housing code enforcement.²² Its

19. Badger, *supra* note 17; Jenny Jarvie & Matt Pearce, *In Georgia, Sean Hannity Is Just Another Landlord Hiking the Rent*, L.A. TIMES (Apr. 27, 2018), <http://www.latimes.com/nation/la-na-hannity-landlord-20180427-story.html> [<http://perma.cc/4N2R-VUG9>].

20. See DESMOND, *supra* note 1.

21. See *infra* Part I.

22. Cary Spivak & Kevin Crowe, *Landlords Try to Keep Identities Secret in Cat-and-Mouse Game*, MILWAUKEE J. SENTINEL (Jan. 6, 2017, 3:19 PM),

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investigation found that Milwaukee LLCs owed nearly \$3 million in housing code fines in addition to \$9 million in delinquent taxes. However, LLCs pose an obstacle to finding assets to satisfy those fines.²³ It also found that many Milwaukee slumlords use LLCs to engage in strategic defaults when their properties amass enough liabilities, thus avoiding the full consequences of enforcement.²⁴

One of the storylines in Matthew Desmond's landmark study of eviction in Milwaukee, *Evicted*, is emblematic of how landlords use LLCs and the problems that result.²⁵ The book's principal landlord, Sherrena, rented a dilapidated apartment to the Hinkston family, who deemed it "the rat hole."²⁶ The apartment had numerous habitability problems, including a door that was off its hinges, holes in the wall, a sagging ceiling, cracked windows, and a roach infestation.²⁷ The Hinkstons moved to the apartment after falling behind on their rent and getting evicted from their previous home. Initially, that landlord had been willing to let the Hinkstons pay off their back rent gradually. However, after a building inspector fined the building for maintenance issues—ones far less significant than those found in "the rat hole" they would soon move into—their previous landlord ran out of patience.²⁸ Needing to find a new home on short notice, the Hinkstons felt forced to accept "the rat hole" for the time being.²⁹

Later on, the apartment's plumbing stopped working completely. When the Hinkstons complained, Sherrena responded that their oldest daughter, Patrice, was living in the apartment in violation of the lease.

<http://www.jsonline.com/story/news/investigations/2016/12/03/landlords-try-keep-identities-secret-cat-and-mouse-game/93925898>
[<http://perma.cc/UJK8-UVV3>].

23. *Id.* As discussed below, landlords may react to housing code fines by ceasing to pay taxes.
24. Cary Spivak & Kevin Crowe, *As Fines Pile Up, Problem Landlords Buy More Homes with Cash — and Neighborhoods Pay the Price*, MILWAUKEE J. SENTINEL (Apr. 23, 2016), <http://archive.jsonline.com/watchdog/watchdogreports/as-fines-pile-up-problem-landlords-buy-more-homes-with-cash--and-neighborhoods-pay-the-price-b996788-376768471.html> [<http://perma.cc/D55V-JMHG>].
25. DESMOND, *supra* note 1.
26. *Id.* at 64.
27. *Id.* at 65-66.
28. *Id.* at 68.
29. *Id.* at 69.

Patrice had originally moved into the apartment upstairs, which was in a similar state of disrepair. Frustrated with the pace of repairs, Patrice decided to withhold half of her rent until the apartment was completely fixed. Sherrena then stopped making any repairs pending Patrice's full payment of back rent. Eventually, she evicted Patrice.³⁰ The Hinkstons instead tried a different approach: they hired a plumber to make the repairs and deducted the cost from their rent. Withholding part of their rent in turn caused Sherrena to issue eviction papers once again.³¹ The Hinkstons considered calling a building inspector but remembered their experience with their previous landlord. They worried that Sherrena would just retaliate by following through with the eviction, and the Hinkstons still wanted to stay in the apartment until they found a better place.³² Even if they were able to pay back their rent, Sherrena could have still evicted them for the lease violation.

At this point, Desmond zooms out to observe that this is a common situation. When tenants violate their lease, most commonly by failing to pay their rent, their landlords tend to neglect repairs. Sherrena succinctly sums up this phenomenon: "If I give you a break, you give me a break."³³ Despite the fact that these increasingly run-down properties are presumably losing market value, they tend to be highly profitable precisely because they are below code. The Hinkston property is Sherrena's most lucrative.³⁴

Eventually, these "properties stop[] chasing out, because they amass[] too many fines or require[] costly repairs..."³⁵ When that happened, "Sherrena would 'let 'em go back to the city.'"³⁶ By that, she meant that she would not pay the fines or make the repairs, but instead abandon the property until the city repossessed it. This practice was enabled by

30. *Id.* at 72-74.

31. *Id.* at 74.

32. *Id.* at 75-76.

33. *Id.* at 76. The process can also work in reverse, with the tenants withholding some rent, in response to poor maintenance—although as discussed *infra* the landlord may just counter by evicting the tenants.

34. *Id.* ("The four-family property . . . was Sherrenas's most profitable[.]"). There is no further information given as to the time period over which profitability is being measured. Additionally, it is important to note that Sherrena does not have a pre-set group of properties for which she employs this strategy.

35. *Id.* at 354 n.16.

36. *Id.*

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Sherrena's strategy of putting each of her properties in a separate LLC: "In the eyes of the law, it was the company, not Sherrena that defaulted."³⁷ When the city does repossess a building, it tends to simply demolish it instead of repairing it, thus diminishing Milwaukee's affordable housing stock.³⁸

The Hinkstons were able to make a deal with Sherrena to stave off eviction, but on extremely disadvantageous terms. They agreed to pay Sherrena an extra \$550 over four months—with no assurance that the maintenance of the apartment would improve.³⁹ The extra strain on the family's cash flow meant that they would have to stay longer in "the rat hole," as they would not be able to save up enough money for a security deposit at a new apartment. Misfortune begets misfortune. Meanwhile, an adjacent building on the same property burned down, taking the life of a small child.⁴⁰ When firefighters arrived at the scene, they did not hear any smoke detectors. Sherrena could not remember if she had installed them in the building.⁴¹ Eventually, the Hinkstons were able to save enough money to move to a better apartment in Tennessee and restart their lives.⁴²

A. The Landlord's Incentives

Desmond gives a good account of how landlords use LLCs, but the legal and economic advantages of LLC structures for landlords—particularly for owners of substandard housing—is beyond the scope of Desmond's ethnographic study.⁴³ Housing codes set a minimum level of habitability standards that all dwellings in a given jurisdiction must meet. They tend to be quite comprehensive.⁴⁴ However, as is often the case when the

37. *Id.*

38. *Id.*

39. *Id.* at 157.

40. *Id.* at 199-201.

41. *Id.* at 202.

42. *Id.* at 294.

43. *Id.* at 76.

44. For example, New Haven's Housing Code regulates requirements for a range of features. *See* NEW HAVEN, CONN., CODE OF ORDINANCES tit. V, para. 303(c) (2018) (requirements for ceiling heights); *id.* para. 307 (requirements for window screens); *id.* para. 311 (requirements for vegetation and bare dirt patches).

government restricts trade (in this case, for housing below a certain quality), there is market pressure for a black market.⁴⁵ Substandard housing is presumably cheaper, and cash-strapped renters may be forced to skimp on housing in order to purchase other goods and services.

In these situations, the initial rental agreement may contemplate housing that is up to code.⁴⁶ But soon, Sherrena's "I give you a break, you give me a break" philosophy will start to play out. Given the economics of poverty, renters will at some point struggle to pay the full rent. Landlords may accept these lower payments but, in return, stop making full repairs.⁴⁷ The apartment has moved into a lower quality, lower price zone that is

45. For a classic Law and Economics discussion of black markets, see Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 337-41 (1978).

46. Interestingly, Desmond observes that Milwaukee landlords are not affirmatively barred from renting out apartments that are violating the housing code. DESMOND, *supra* note 1, at 73. Landlords must only disclose the violations. *See, e.g.*, WIS. ADMIN. CODE ATCP § 134.04 (2018) ("Before entering into a rental agreement or accepting any earnest money or security deposit from the prospective tenant, the landlord shall disclose to the prospective tenant . . . [a]ny building code or housing code violation to which all of the following apply . . . [or] [t]he following conditions affecting habitability."). It is not entirely clear how this provision interacts with the non-waivable requirements of the housing code. On the one hand, housing codes create minimum standards for housing conditions that tenants and landlords cannot contract away. On the other, this provision appears to contemplate landlord and tenants contracting to rent properties that violate these very requirements. Perhaps the best way to think about it is an attempt by the government to regulate a black market by imposing additional penalties for participating in the black market in an especially disfavored way. There are already negative consequences for violating the housing code, but if the landlord fails to disclose, then there are additional consequences. This provision is similar to statutes that impose additional penalties for selling illegal drugs while carrying a firearm. *See, e.g.*, 18 U.S.C. § 924(c)(1) (2018). It is not that the government is condoning the underlying crime. It is just that if the crime is going to occur, the government would at least prefer that the criminals leave their guns at home. The government therefore creates an incentive targeting that behavior specifically. Nevertheless, overall this approach appears to be unusual. A couple other jurisdictions do have provisions that require disclosures of outstanding inspection orders issued due to housing code violations. *See* MINN. STAT. ANN. § 504B.195 (West 2018); 34 R.I. GEN. LAWS § 34-18-22.1 (2018).

47. DESMOND, *supra* note 1, at 76.

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prohibited by the government but made viable if not inevitable by the economics of the housing market.

This may explain something that Desmond observes but does not fully explain: the pricing of apartments. In Milwaukee, comparatively little separates the cheapest and most expensive neighborhoods: “Ten percent of units rented at or below \$480, and 10 percent rented at or above \$750. A mere \$270 separated some of the cheapest units in the city from some of the most expensive.”⁴⁸ As Sherrena explains, in Milwaukee, “[a] two bedroom is a two bedroom is a two bedroom.”⁴⁹ Desmond attributes this to racial segregation, and that surely plays a major role.⁵⁰ However, it also seems likely that the reported prices for those apartments do not represent what tenants are actually paying, in particular when the unit is not subsidized by the government. While landlords in low-income neighborhoods may price their apartments similarly to those in middle class and affluent areas, they simply are not expecting their tenants to pay that amount of rent over the course of the lease. Instead, they anticipate their tenants paying less and that they will neglect maintenance in return. The sticker price is a charade for the law, concealing a classic black market for substandard housing. The tenant saves on rent. The landlord can make exceptionally large profits from the property, since she can now neglect maintenance.⁵¹

However, this strategy is not sustainable for any one property. If the property is in a depressed real estate market, it will eventually deteriorate past what could be described as a point of no repair. The root of the problem is that it is impossible to evade housing inspections indefinitely. Over time, the property will accumulate expensive fines. Even if it does not, the property will require repairs to stave off the inevitable fines. In struggling areas, fines can be substantial compared to the value of a property. For example, the *Journal Sentinel* reporters observed one well-known slumlord buy 63 properties at an average cost of just \$10,000.⁵² At

48. *Id.* at 74.

49. *Id.* at 75.

50. *Id.*

51. Counter-intuitively, the savings to the landlord from reduced maintenance costs can be amplified by the superior bargaining position of a landlord in this position. This is discussed in more detail *infra*.

52. Spivak & Crowe, *As Fines Pile Up*, *supra* note 24. The issue of pricing is important. In markets like New York City, where even the most expensive property is worth well into the six figures, strategic defaults are unlikely. But in Milwaukee, these fines can be quite substantial. The principle “Penalties”

some point, the fines and the amount necessary to make repairs—combined with the ongoing obligation of property taxes—will actually exceed what the property is worth. When this happens, the property becomes essentially worthless to the landlord. If the landlord were to sell the building, the fines would consume the entirety of the proceeds. Alternatively, if the landlord continues to rent out the building, the city will garnish the rent, meaning that the building generates no cash flow. Making things worse for the landlord, if the repairs are not made, the city will re-inspect the building, tacking on additional fines. Even if the property had not yet amassed substantial fines, the expensive, necessary repairs would reduce the market price of the property.

When the landlord reaches the point of no repair, it makes sense for him or her to simply walk away from the building. If the landlord were to consider the property as a standalone business, it would have a negative net worth with no chance of improvement. While the property may have generated large profits—even multiple times larger than what it initially cost to buy—it has, as Sherrena put it, “cashed out.”⁵³ Additionally, because the property has a negative net worth, the landlord will be unable to sell it for any money.⁵⁴ The landlord would effectively have to pay the purchaser to take the property off his or her hands.

This is where the single-property LLC comes in. If the landlord holds the property individually, then the landlord would be personally liable. Additionally, the government would be able to go after *all* of the landlord’s other assets to enforce the fine.⁵⁵ Even if the landlord were to put all of his or her rental properties in a single LLC, the government could still

section of the Milwaukee Housing Code establishes a range of fines of \$150 to \$5,000 per violations per day. MILWAUKEE, WIS., CODE OF ORDINANCES § 200-19 (2016). Imagine that \$300 per day was assessed against a property. It would take a little more than a month for that cumulative sum to exceed \$10,000.

53. DESMOND, *supra* note 1, at 76 n.16.

54. Some housing code schemes may fine the owner directly. *See, e.g.,* NEW HAVEN, CONN., CODE OF ORDINANCES tit. V, paras. 100(s), 102 (2018). Therefore, if the landlord were able to sell the property, the liability for the fine would still remain with the landlord. However, even in those circumstances, the landlord will be losing money since they would have to pay the fine. Their loss would just be mitigated by selling the building, but there would be no overall economic difference.

55. If there are multiple landlords who invest in a property together and do not use a corporation, then it would be a partnership and the same principle would apply.

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foreclose on those other properties to recover for the unpaid fines.⁵⁶ The only way to avoid full liability for failing to make repairs is to place each property in a separate LLC. If a landlord is able to do this, then the government would at most be able to sue for that building only. This move cabins the landlord's loss from the fine.⁵⁷ The only loss the landlord sustains from housing code enforcement is that this single-property is now worthless. Thus, the landlord is able to use the LLC structure to avoid full liability.

This strategy resembles the approach of a homeowner who walks away from an underwater mortgage. When the housing bubble burst in the latter half of the 2000s, many families found that they owed more on their mortgage than their house was actually worth.⁵⁸ Typically, a mortgage is secured only by the property that the proceeds of the mortgage were used to purchase. This means that if the borrower defaults on the loan, the lender can respond by suing for title to the property.⁵⁹ In fact, in a number of states, it is illegal for the mortgage to be secured by anything else other

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56. To be precise, since the property owner would still be under an obligation to pay property taxes, then the foreclosure could be for back taxes. However, even in those cases, it still would have been the housing code fines that would have driven the landlord's decision making, since the property taxes are an ongoing obligation regardless of the quality of the apartment's maintenance. Of course, the amount of property taxes will affect how much the landlord values the property—the greater the tax burden, the less the property is worth. *See* Jeffrey P. Guilfoyle, *The Effect of Property Taxes on Home Values*, 8 J. REAL EST. LITERATURE 111, 111 (2000). But like the amount of money in fines each jurisdiction imposes for code violations, property taxes merely affect how quickly the “point of no repair” is reached.
 57. It is important to note that when a city forecloses on a property in this situation, the property is not necessarily worthless to the city. If the property was only worthless to the landlord because the sum of fines exceeded what the property was otherwise worth, then the property would still have value to the city, as the city would not impose the remaining fines on itself as the new owner.
 58. David Streitfeld, *No Help in Sight, More Homeowners Walk Away*, N.Y. TIMES: BUS. (Feb. 2, 2010), <http://www.nytimes.com/2010/02/03/business/03walk.html> [<http://perma.cc/XA3Z-HXAN>].
 59. Additionally, most states allow deficiency judgments, whereby the lender can sue the borrower personally for the excess owed after the sale of a foreclosed property. *See, e.g.*, ME. STAT. tit. 14, § 6323 (2018); N.J. STAT. ANN. § 2A:50-2 (West 2018); TEX. PROP. CODE ANN. § 51.003 (West 2017); *Flagship State Bank v. Drew Equip. Co.*, 392 So. 2d 609 (Fla. Dist. Ct. App. 1981); *Federal Land Bank v. Cummings*, 735 P.2d 111 (Kan. Ct. App. 1987).

than the property.⁶⁰ Normally, that is enough to deter borrowers from defaulting on a mortgage. They would lose their home and the value of their home is more than what they actually owe on the mortgage. However, when borrowers are underwater on their mortgage, it often no longer makes financial sense for them to keep paying it.⁶¹ In order to keep the property, borrowers would have to pay more money than the property is actually worth. They would be paying a large sum and in return would be receiving an asset that was worth less. Essentially, they would be wasting money by paying the mortgage. At this point, borrowers should just walk away and let the bank foreclose on their property, even if they could afford to keep paying.⁶² During the financial crisis, this practice became so common that *60 Minutes* deemed it “strategic default.”⁶³

Landlords who are underwater on their property from fines and taxes have similar incentives to engage in a strategic default. If they have put each of their properties in a separate LLC, then their fines and repairs are essentially a liability that is secured only by the individual property. Like underwater mortgagees, landlords are not going to pay more money in fines and maintenance costs than the building is actually worth.⁶⁴ And like

60. These states effectively accomplish this by banning deficiency judgments. *See, e.g.*, ALASKA STAT. § 34.20.100 (2018); ARIZ. REV. STAT. ANN. §§ 33-814.G, 33-729.A (2018); CAL. CIV. PROC. CODE § 580b (West 2018); MONT. CODE ANN. § 71-1-222 (2017); N.C. GEN. STAT. § 45-21.38A (2018); N.D. CENT. CODE § 32-19-03 (2018); OR. REV. STAT. § 86.797(2) (2017); WASH. REV. CODE § 61.24.100 (2018); *see also Strategic Default: Walking Away from Mortgages*, CBS NEWS (May 6, 2010), <http://www.cbsnews.com/news/strategic-default-walking-away-from-mortgages/> [<http://perma.cc/AEM7-2VFU>].

61. In response to this predicament, the Federal Government created the Home Affordable Modification Program (HAMP), which facilitated mortgage modifications that would make the mortgage more affordable and, in some cases, restore incentives not to walk away. *See* 12 U.S.C. § 5219a (2018); U.S. DEPARTMENT OF THE TREASURY, *Making Home Affordable* (2017), <http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/default.aspx> [<http://perma.cc/46GB-NUDX>].

62. In states that have banned deficiency judgments, the only cost to the borrower of walking away is that their credit score would be significantly damaged.

63. *See, e.g., Strategic Default, supra* note 60.

64. This assumes that the landlord does not expect to make more money from renting the building than a generic landlord. If the landlord did think that, then the building would be worth more to the landlord than the market valuation. However, even if that were the case, the strategic default analogy

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underwater mortgagees, landlords will avoid having to fully pay off their liabilities. The difference, of course, is that landlords have arrived at this scenario by neglecting to make basic repairs on their properties, while mortgagees are enduring a drop-in value of their property that is not of their own making. And for the landlord, avoiding obligations to pay off their liabilities means avoiding full housing code enforcement.

B. Negative Consequences for Tenants

There are three primary consequences of landlords' ability to avoid full liability for housing code violations. The first and most straightforward is that landlords now have a decreased incentive to make repairs in all scenarios. They know that if they are fined for failing to maintain their buildings, their exposure is limited to whatever that building is worth. Thus, tenants will suffer from living in poorly maintained buildings, even in cases where they are entirely current on their rent. In the example from *Evicted*, Sherrena dragged her heels on making repairs even before the Hinkstons began to violate their lease.

Second, as noted above, allowing landlords to avoid full liability for housing code violations makes it more economically viable for the landlord to neglect repairs in exchange for less money in rent. After all, the landlord now has less financial risk from pursuing this strategy. However, when this strategy is employed, it has a subtle but important effect on the relationship between the tenant and the landlord: it shifts substantial power to the landlord. The reason is that, in most jurisdictions, landlords can evict a tenant for nonpayment of rent even if the dwelling violates the housing code (with an important exception as explained below).⁶⁵ This

would still hold, since at some point the building will accumulate liabilities that are greater than what the building is worth *to the landlord*. The landlord would presumably continue to rent out the property, as long as was still worth something to the landlord.

65. DESMOND, *supra* note 1, at 362 n.2. For the purposes of this Note, it is unnecessary to fully explain why the landlords are favored when both they and the tenants are breaking their legal obligations and whether this policy makes sense. Part of the rationale may come from fear of creating a moral hazard—tenants who are facing eviction for nonpayment of rent would have a perverse incentive to damage the premises or cause maintenance problems like jammed plumbing. Overall, this Note does not seek to address this issue and the policy solution proposed below would not change the fact that landlords are able to evict tenants for nonpayment of rent even if the dwelling is not up to code.

policy choice plays an important role in regulating the relationship between landlords and tenants. As the discussion below explains, it enables landlords to more comfortably violate the law and abuse their bargaining power over tenants.

The only exception to this general rule comes when a property falls into an extremely serious state of disrepair. In such circumstances, the tenant is excused from paying rent entirely. For example, under Connecticut's rent abatement statute, General Statutes § 47a-4a, a tenant does not have to pay rent if poor maintenance "materially affects his safety . . . or has rendered the premises uninhabitable."⁶⁶

These kinds of rent abatement statutes provide an important check on the landlord. However, because they matter only for the worst cases, they tolerate significant amounts of poor maintenance and resulting tenant suffering. Many egregious cases of poor apartment maintenance can fall through the cracks because they fall short of rendering the premises actually uninhabitable. Additionally, the complexity of rent abatement statutes makes it likely that a tenant would need to have legal counsel in order to utilize them. However, the vast majority of tenants facing eviction lack lawyers.⁶⁷ Making matters even worse, a tenant whose apartment is

66. *Housing Auth. of E. Hartford v. Olesen*, 624 A.2d 920, 922 (Conn. App. Ct. 1993). An example of a case that was able to meet this standard was *Defesus v. Poe*, No. CVNH89033102, 1989 WL 516489 (Conn. Super. Ct. Oct. 12, 1989). In that case, the tenant's apartment had such a severe rodent infection that she was able to produce a box of 28 dead mice that she caught over three days. The tenant further testified that the mice would crawl all over her and her children when they tried to sleep at night. *Id.* at *1. On top of that, the property suffered from "heat, water, leaking windows, [and] crevices which were entry routes for vermin and insects." *Id.* In *Chongo v. Paredes*, a tenant was excused from paying rent because the landlord failed to provide a heating system. No. CV100016659, 2001 WL 51660 (Conn. Super. Ct. Jan. 3, 2001).

Because of the higher standard of disrepair, the moral hazard issue discussed in the previous footnote is much less of an issue. It seems unlikely that a tenant would actually damage her apartment in a way that would materially affect her safety or render her apartment uninhabitable altogether.

67. Nationwide, 90% of tenants facing eviction do not have a lawyer. *From the Field: San Francisco Voters Guarantee Right to Counsel for All Tenants Facing Eviction*, NAT'L LOW INCOME HOUSING COALITION (June 11, 2018), <http://nlihc.org/article/field-san-francisco-voters-guarantee-right-counsel-all-tenants-facing-eviction> [<http://perma.cc/6YHG-HESL>]. While increasing tenant access to counsel would allow for significant inroads towards fixing

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poorly maintained but does not meet the standard of the rent abatement statute may partially or fully withhold rent, without understanding that they are thereby risking eviction. Thus, tenants' attempts to get their apartments fixed and assert their legal rights can instead result in their eviction.⁶⁸ Finally, a property that meets the high standard of a rent abatement statute is likely to be at or close to the point of no repair. As a result, the landlord is already more likely to just walk away regardless of the abatement statute.

The upshot is that when a landlord neglects repairs in exchange for letting a tenant fall behind on the rent, the landlord can usually evict at any time. As a result, the landlord possesses immense power over the tenant. The landlord could, for example, let the apartment fall into a state of disrepair far beyond what is expected and do so even if the tenant is only slightly behind on the rent. What results is not an efficient black market but an opportunity for the landlord to extract large profits. This is why the most dilapidated properties in Sherrera's portfolio are her most profitable.⁶⁹ The only way that a tenant could retaliate would be to call a housing inspector, but the LLC use structure limits the landlord's potential exposure.⁷⁰ In many cases it will be more profitable for the landlord to

housing maintenance issues, it would still not be a substitute for full housing code enforcement. The private remedies available to tenants are limited and lack punitive sanction of government enforcement of the housing code.

68. This is often a byproduct of the absolutist, all-or-nothing nature of rent abatement statutes. There is no such thing as partial rent abatement—something which can be surprising to many tenants. But from the law's point of view, either the landlord has violated the implied warranty of habitability or he has not.
69. DESMOND, *supra* note 1, at 76.
70. Additionally, the landlord could and likely would retaliate against a tenant who calls a housing inspector by evicting them. While many jurisdictions prohibit evictions in retaliation for a complaint about housing conditions, *see, e.g.*, CONN. GEN. STAT. § 47a-20 (2018), this defense is significantly curtailed when the eviction is for nonpayment of rent. *See id.* § 47a-20a(a) ("Notwithstanding the provisions of section 47a-20, the landlord may maintain an action to recover possession of the dwelling unit if . . . [t]he tenant is . . . [being evicted] for nonpayment of rent"); *see also* *Mobilia, Inc. v. Santos*, 492 A.2d 544 (Conn. App. Ct. 1985) (holding that retaliatory eviction defenses are inapplicable when the eviction is for nonpayment of rent); *Maretz v. Apuzzo*, 378 A.2d 1082 (Conn. Super. Ct. 1977) (same). Also, many tenants may only call the housing inspector *after* the landlord begins the eviction process against them—when it is too late to take advantage of anti-retaliation protections.

abuse her bargaining power and just risk the fines. However, if a landlord were not able to limit her exposure to potential fines from a retaliatory housing code inspection, then she may be deterred from abusing her bargaining power.

The third negative consequence of landlord LLC use is that it can increase neighborhood blight and reduce the supply of affordable housing. As the property deteriorates, it can become a community eyesore. Then, when a landlord strategically defaults, a by-product is that the city is left in possession of the landlord's former property. Often, city governments are poor managers of the properties they acquire through this process, frequently just abandoning them.⁷¹ The problem can be particularly difficult in cities that do not have tight housing markets. If the housing market is slow, then the city may have trouble quickly reselling the foreclosed property to another private landlord.⁷² When city-owned properties are abandoned, the supply of affordable housing decreases, further contributing to neighborhood blight.⁷³

II. CURRENT APPROACHES TO THE STRATEGIC DEFAULT PROBLEM

The cities of New Haven and Milwaukee provide useful examples of how modern housing codes address corporate ownership of properties. There are a couple reasons why they make for particularly appropriate case studies. First, this Note builds off of Desmond's work. Accordingly, it

71. DESMOND, *supra* note 1, at 354-55 n.16. *But see* Christopher J. Allred, *Breaking the Cycle of Abandonment: Using a Tax Enforcement Tool to Return Distressed Properties to Sound Private Ownership*, PIONEER INST. (2000), http://www1.nyc.gov/assets/hpd/downloads/pdf/bgc_winner.pdf [<http://perma.cc/5A3B-E8MB>] (describing an municipal initiative to avoid abandonment by transferring foreclosed parties to new third-party owners).

72. *See, e.g.*, Margaret Dewar, Eric Seymour & Oana Druță, *Disinvesting in the City: The Role of Tax Foreclosure in Detroit*, 51 URB. AFF. REV. 587, 592 (2015). It is true that Detroit itself does not suffer from an affordable housing shortage. But Detroit's difficulties managing foreclosed properties contributed to the city's epidemic of abandonment and blight.

73. Often, the properties are then demolished. Even after a city or neighborhood's fortunes turn around, it can be difficult to construct new housing on city-owned vacant lots. *See, e.g.*, Kristin Toussaint, *In Housing Crisis, More Than 1,000 City-Owned Properties Sit Empty: Comptroller*, METRO (Feb. 13, 2018), <http://www.metro.us/news/local-news/new-york/1000-city-owned-properties-empty-comptroller> [<http://perma.cc/P3QF-TU92>].

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would be remiss not to study Milwaukee's housing code in more depth. Second, many, if not most, American cities appear to use an approach similar to New Haven and Milwaukee. The two cities appear to have modeled the sections of their housing codes determining who can be held liable for violations on the Standard Housing Code.⁷⁴ However, each city does take a different tack in creating liability for housing code violations. New Haven attempts to attach liability not just to the title holder, but also, in limited circumstances, to those who actively control the premises.⁷⁵ Milwaukee, similarly, makes the legal owner as well as any "operator" liable for housing code violations.⁷⁶ Ultimately, both approaches are insufficient to fully address the LLC issue discussed above, as neither results in full liability for housing code violations.

A. New Haven

The operative provision of the New Haven Housing Code is the definition of "owner."⁷⁷ The first part of that provision defines owner the

74. See STANDARD HOUSING CODE § 202 (1994), http://www.ecodes.biz/ecodes_support/Free_Resources/1994_Standard_Housing_Code/PDFs/06_Chapter%202.pdf [http://perma.cc/G8WN-54X2] (The Standard Housing Code is a model code produced by the International Code Council.). The New Haven code largely tracks the standard code but eliminates its language treating the owner as the "mortgagee or vendee in possession," an "assignee of rents," or "lessee." See *infra* Section II.A. Also, in some cases the Standard Code attaches liability to certain persons in control of a building that the New Haven code requires to be agents of the owner. The Milwaukee code is effectively identical to the Standard Code but places half of its definition of an owner into a separate term called an "operator." See *infra* Section II.B.

75. See NEW HAVEN, CONN., CODE OF ORDINANCES tit. V, ¶ 100(s).

76. See MILWAUKEE, WIS., CODE OF ORDINANCES § 200-08-64 (2011)

77. NEW HAVEN, CONN., CODE OF ORDINANCES tit. V, ¶ 100(s). Note, however, that it is not entirely clear whether most of the New Haven Housing Code imposes liability on "owners" or on a more limited subset of persons. For example, many provisions create liability with the following language: "No person shall . . . let to another for occupancy any dwelling or dwelling unit for the purpose of living, sleeping, cooking, or eating therein, which does not comply with the following requirements [pertaining to specific areas of housing maintenance]." *Id.* ¶ 300. This would appear to cabin liability only to the title holder, since only that person or corporation actually lets the dwelling. On the other hand, the Code's definition of "owner" includes the following provision: "Any such person thus representing the actual owner shall be

traditional way, as “any person who . . . [s]hall have legal title to any dwelling or dwelling unit, with or without accompanying actual possession thereof.”⁷⁸ However, the second part of the provision adds: “[Owner shall mean any person who] [s]hall have charge, care, or control of any dwelling or dwelling unit, as owner or agent of the owner, or as executor, executrix, administrator, administratrix, trustee or guardian of the estate of the owner.”⁷⁹ The language that creates potential liability for “an agent of the owner” who exercises “charge, care, or control” over the dwelling is important. Under this language, a landlord who maintains and actively manages the building—even if kept in a single-property LLC—could arguably be personally liable for housing code violations.⁸⁰ The city could argue that a landlord is not just the owner of an LLC, but also an agent of the same LLC. As an agent of the LLC who is exercising control over the building, the landlord would be personally liable and the housing code would be fully enforced.

bound to comply with the provisions of this title and to the rules and regulations adopted pursuant thereto, or the same extent as if he were the owner.” *Id.* ¶ 100(s)(2). It is not clear how that provision interacts with the language from Paragraph 300. It seems unlikely, though, that the intention of that part of Paragraph 100(s)(2) is to make a person who represents the owner in a limited capacity liable for all of the owner’s transgressions. Furthermore, while the phrase “actual owner” is vague, it seems that it has to be referring to the title holding entity, as opposed to something like a beneficial owner, *see infra* note 80. If it were referring to something like a beneficial owner, that that would produce the extremely odd result of imposing duties on the representative of the beneficial owner, but not the beneficial owner herself.

78. *Id.* ¶ 100(s)(1). Another section of the Housing Code defines person to include both natural born persons and corporations or other business entities. *See id.* ¶ 100(t).
79. *Id.* ¶ 100(s)(2). It seems safe to assume that the word “owner” within the provision only refers to owner in its ordinary, traditional sense. Otherwise language such as “agent of the owner” would become oddly circular. Moreover, use of the phrase “the owner” seems to suggest only one owner.
80. Exercising control over the LLC would be insufficient to bring a landlord within the definition of owner because of the “as owner or agent of the owner” language. The landlord clearly does not exercise control over the LLC as the owner of the property because the LLC itself is the owner of the property. And the landlord, when just controlling the LLC without active management of the property, is not acting as an “agent of the owner,” but rather as the shareholder of the owner.

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However, even if a court were to interpret the code provision in the way described above, there are still three reasons that this approach would be unable to fully address the single-property LLC problem. First, it could be difficult for a court to prove liability. While the “charge, care, or control” provision has rarely been interpreted by courts, at least one court in another state has held that the president and sole stockholder of a corporation is not per se liable, even if that corporation indisputably does have “charge, care, or control.”⁸¹ Rather, as another court has held, to find liability for a corporate officer under a “charge, care, or control” statute that person must have personally committed, inspired, or participated in a housing code violation.⁸² The enforcing agency would instead need to marshal affirmative evidence of the landlord’s activities. This could be difficult, time consuming, and costly. It would potentially require the cooperation of current or former tenants, many of whom may be unwilling or unable to take the time testify. All of these considerations would make it challenging for a state or municipality to enforce this kind of statute widely.

Second, there are still ample opportunities for landlords to avoid liability. A savvy landlord could always use additional layers of corporate protection. For instance, the agent of the landlord could be another LLC, and not the landlord personally. Moreover, if the landlord is acting as the LLC’s agent insofar as she is charged with making a discrete repair (e.g., fixing the toilet), can she really be said to have “charge, care, or control of” the “dwelling”? It is difficult to see how her position would differ from that of a third-party plumber who was hired to make the repair. At the very

81. *See Toliver v. Waicker*, 62 A.3d 200, 208 (Md. 2013) (interpreting an identical provision in a Maryland housing code); *cf. City of Columbus v. Cheplowitz*, No. 98AP-1420, 1999 WL 604161, at *3 (Ohio Ct. App. Aug. 12, 1999) (holding the same language to mean that a person in a common law partnership is per se liable if the partnership has “charge, care, and control,” since a partnership does not have limited liability protection). However, one court has suggested that “charge, care, or control” covers “those who . . . seek to avoid the sanctions of the Housing Code through corporate formalities.” *Johns v. Rozet*, 15 F.3d 1159 (D.C. Cir. 1993). There is unfortunately very sparse case law interpreting this provision on this point that has been published or at least made available online.

82. *See Allen v. Dackman*, 991 A.2d 1216, 1226, 1226 n.13 (Md. 2010) (initially interpreting “owner” in an identical provision to mean any person who possesses the ability to affect title to a property, but then limiting liability for corporate officers only to those who personally committed, inspired, or participated in a housing code violation).

least, this statutory structure creates a perverse incentive structure. If a landlord chooses to neglect a repair completely, then arguably no one is serving as the owner's agent, and no person has "charge, care, or control" of the dwelling. Accordingly, the landlord would be able to avoid liability.

Third, many landlords do not directly maintain their buildings at all but instead contract that job to other persons or businesses.⁸³ In this case, the city would not be able to sue the landlord personally, since the landlord would not be acting as an agent of the LLC.⁸⁴ Thus, the landlord would again be insulated from full liability for poor maintenance. When LLCs do hire a different person to be in charge of maintenance, it will generally be unavailing for the city to sue that person instead. This employee may be judgment proof from any fines. Nor would an approach that focuses on managers or management companies necessarily be fair.⁸⁵

83. *Survey Finds Majority of Rental Property Owners Use a Property Manager, With Rates Expected to Rise in 2016*, BUSINESS WIRE (May 24, 2016, 9:00 AM), <http://www.businesswire.com/news/home/20160524005289/en/Survey-Finds-Majority-Rental-Property-Owners-Property> [<http://perma.cc/PMT2-PEXF>].

84. However, if the landlord does actively manage the property and does not use additional layers of corporate protection, then it would be possible for the state or city to show that she can be held liable under the statute. The problem with the New Haven approach is not that a landlord who uses a single-property LLC can *never* be held liable under the housing code. It is that too many of these landlords could evade liability.

85. Unfortunately, other areas of housing law such as fair housing also does a poor job of addressing these issues, and thus provide no good alternative model. At the federal level, the Supreme Court has held that the Fair Housing Act does not provide for personal liability for corporate owners or officers beyond traditional agency law principles. *Meyer v. Holley*, 537 U.S. 280, 282 (2003). Lower courts have found that corporate officers or owners who "participate in, authorize, or ratify" federal Fair Housing Act violations can be held personally liable. *See, e.g., Fielder v. Sterling Park Homeowners Ass'n*, 914 F. Supp. 2d 1222, 1227 (W.D. Wash. 2012) ("[C]ourts have found that directors who participate in, authorize, or ratify the commission of a civil rights or fair housing tort may be held individually liable"). This seems largely identical in practice to the active control standard of the New Haven Code.

B. Milwaukee

Milwaukee's housing code is similar to New Haven's, but attaches potential liability to an at least theoretically wider swath of people, covering both "owners" and "operators."⁸⁶ In its pertinent section, "owner" is defined as "any person who . . . is the recorded or beneficial owner or has legal or equitable title to any dwelling, dwelling unit, rooming unit or hotel unit."⁸⁷ Only the LLC itself would meet this definition. The landlord would not be considered a beneficial owner, which is a status akin to an individual investor whose stock is held by a broker.⁸⁸ The landlord has no right to control the property of the LLC, except insofar as she is the owner of the LLC. The definition of "operator" is "any person who rents to

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86. Unlike New Haven, Milwaukee more clearly connects liability for Housing Code violations to its Code's definition of owner and operator. While MILWAUKEE, WIS., CODE OF ORDINANCES § 200-19 (2011) does establish a default of broad liability for the "owner," the "operator," and the "occupant" of any premises in violation of the code, subsequent substantive provisions mainly limit liability for poor maintenance to just the owner or operator. For example, § 275-81(b) states that when certain circumstances are met, "[e]very owner or operator . . . shall be responsible for maintaining in a clean and sanitary condition all communal, shared or public areas of the structure and premises thereof . . ." That section thus imposes a specific duty on "owners" or "operators." Accordingly, only they can be held liable under § 200-19, because only they can actually violate § 275-81(b). Other provisions of the Milwaukee code are structured in this way.
87. *Id.* § 200-08-66. The section also contains language not relevant here, which pertains to vacant lots, non-residential buildings, and those who administer the estate of an owner. Like the New Haven Housing Code, the Milwaukee Code also contains a provision defining "person" as including corporations. *Id.* § 200-08-69.
88. *See, e.g., Beneficial Owner*, BLACK'S LAW DICTIONARY (10th ed. 2014). Beneficial ownership is created when an asset is nominally held by one entity, but, due to a contractual relationship, a different entity (the beneficial owner) is allowed to have use of the asset. For example, for most individual investors, their brokerage holds title to their investments. However, under a contract, the brokerage allows the investor (the beneficial owner) to vote the shares according to her wishes and to receive any proceeds from the investment. Beneficial ownership has nothing to do with limited liability or piercing the corporate veil. Milwaukee may have wanted to include beneficial ownership to cover situations where a trust holds a property on behalf of a beneficiary. This may be especially pertinent because some real estate investors use investment trusts.

another or others or who has charge, care or control of a building or part thereof, in which dwelling units, rooming units or hotel units are let.”⁸⁹

The operator definition is similar to the second part of New Haven’s “owner” definition, except it omits the requirement that the person be the agent of the owner. That difference theoretically would make it impossible for landlords to shield their own activities in maintaining an apartment behind a different LLC. However, the Milwaukee approach still suffers from the other flaws of the New Haven code. The enforcing agency must engage in a time-consuming, costly, and difficult process to gather affirmative evidence of active management. The focus on active, personal control over the apartment simply incentivizes landlords to cabin their management activities, lest they be construed as exercising control over the premises. Moreover, Milwaukee’s control-focused approach would fail to address the wrongdoing of landlords who contract maintenance and repairs to third parties.⁹⁰

C. Other Potential Sources of Liability: Criminal Law and Unfair Trade Practices Laws

A landlord’s failure to properly maintain an apartment can potentially have criminal consequences. However, use of the corporate form is likely sufficient to allow landlords to avoid criminal liability as well. The root of the problem is that criminal sanctions, when they exist, are usually tied to

89. MILWAUKEE, WIS., CODE OF ORDINANCES § 200-08-64 (2011).

90. *See supra* note 80. The City of Milwaukee apparently concurs that its housing code, as currently written, can allow many landlords to escape from liability. In 2017, city officials lamented to the Milwaukee Journal Sentinel that in many cases, the only way to go beyond the assets of an LLC to satisfy housing code fines is to pierce the corporate veil. Spivak & Crowe, *Landlords Try to Keep Identities Secret*, *supra* note 22. As discussed in Part III, *infra*, common law corporate veil piercing is not a legally viable strategy for most cases. In December 2018, the city launched an attempt to pierce the corporate veil of an LLC in order to reach the assets of a landlord, indicating that officials have not developed any new strategies for dealing with this problem. *See* Cary Spivak, *City Asks Court to Hold Tim Brophy and Partner Liable for Debts at a Condemned Property*, MILWAUKEE J. SENTINEL (Dec. 10, 2018, 10:20 AM), <http://www.jsonline.com/story/news/investigations/2018/12/10/notorious-landlord-tim-brophy-and-partner-should-pay-debts-owed-condemned-property-city-says/2241286002/> [<http://perma.cc/N69X-W2E9>].

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violations of the housing code itself.⁹¹ As a result, they are subject to the same issues discussed above. Moreover, even if someone could be held in criminal contempt for refusing to comply with a court order to bring a property in compliance with the housing code, it is not clear how that would result in anyone other than the person/entity (in this case the LLC) being held in contempt.⁹²

In limited cases, under the “responsible corporate officer” doctrine, courts have been willing to extend criminal liability of the corporation to corporate officers and owners on a strict liability basis, but that doctrine is likely inapplicable here. For example, in *United States v. Park*, the Supreme Court affirmed a Federal Food, Drug, and Cosmetic Act conviction of a corporate officer who had no knowledge of wrongdoing by subordinates, but nonetheless had responsibility over them.⁹³ The Court relied on a highly purposive interpretation of the statute.⁹⁴ Overall, responsible corporate officer prosecutions have been confined almost entirely to major violations of food, drug, and environmental law.⁹⁵ Furthermore, courts

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91. *See, e.g.*, NEW HAVEN, CONN., CODE OF ORDINANCES tit. V, ¶ 102 (“Any person who shall violate any provision of this title may, upon conviction, be punished . . . by imprisonment for not more than thirty (30) days; and each day’s failure to comply with any such provision shall constitute a separate violation.”). There appear not to be any other direct avenues for criminal sanctions in Connecticut. Neither Milwaukee nor Wisconsin state laws contains direct criminal sanctions for the landlord’s failure to maintain a rental property.
 92. At the outset, in Connecticut, contempt is usually tied to specific transgressions, rather than a refusal to comply generally. *See, e.g.*, CONN. GEN. STAT. § 22-228 (authorizing contempt for those who fail to comply with orders related to the Milk Marketing Act); *id.* § 51-33a (limiting criminal contempt to “[a]ny person who violates the dignity and authority of any court, *in its presence* or *so near thereto* as to obstruct the administration of justice”) (emphasis added). There appears to be no analogous provision for violating the housing code.
 93. 421 U.S. 658 (1975)
 94. *Id.* at 671, 673. In this sense, responsible corporate officer doctrine is not such much of a formal doctrine but rather a kind of liability that courts occasionally find to be authorized by a statute.
 95. *See* Michael W. Peregrine, *The “Responsible Corporate Officer Doctrine” Survives to Perplex Corporate Boards*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (July 5, 2017), <http://corpgov.law.harvard.edu/2017/07/05/the-responsible-corporate-officer-doctrine-survives-to-perplex-corporate-boards> [<http://perma.cc/W4A5-QTTY>] (noting that while “[responsible corporate officer] prosecutions have been concentrated in the pharmaceutical and medical device industries, pursuant to the federal Food,

have only applied the responsible corporate officer doctrine when they believed that the legislature intended for its use.⁹⁶ Indeed, it appears that no court in the country has ever invoked the responsible corporate officer doctrine for failure to maintain an apartment.⁹⁷

Unfair trade practices law is also, as it currently stands, unlikely to be a source of liability for landlords who use single-property LLCs. At the federal level, Section 5 of the Federal Trade Commission Act, which prohibits “[u]nfair or deceptive acts or practices in or affecting commerce,” appears to have never been applied to cases of poor property maintenance.⁹⁸ At the state level, though, unfair trade practices law, such

Drug and Cosmetic Act,” courts have on occasion allowed prosecution in other areas such as state environmental laws); *see also* United States v. Dotterweich, 320 U.S. 277 (1943) (allowing the prosecution of corporate officers for violations of the Food, Drug, and Cosmetic Act); *BEC Corp. v. Dep’t of Env’tl. Prot.*, 775 A.2d 928 (Conn. 2001) (applying doctrine to state environmental case).

96. *See* Comm’r of Env’tl. Prot. v. Underpass Auto Parts Co., 123 A.3d 1192, 1209 (Conn. 2015) (“[W]e have repeatedly recognized that [the responsible corporate officer doctrine’s] application must be consistent with the intent of the legislature”).
97. To arrive at this conclusion, I conducted searches on Lexis Nexis for cases that mentioning either “responsible corporate officer” or “responsible corporate agent” and housing code related terms like “housing code,” “building code,” and just “housing.” Whether courts should expand the responsible corporate officer to create another tool to fight landlord noncompliance with housing codes may be a topic for another paper. *Cf.* State v. Arkell, 672 N.W.2d 564, 569 (Minn. 2003) (rejecting a responsible corporate officer prosecution for *building* code violations on the basis that the building code is not a public welfare statute).
98. 15 U.S.C. § 45(a)(1). To arrive at this conclusion, I shepardized the U.S. code section and then searched for housing related terms. This is not entirely surprising since housing-maintenance matters are traditionally a state and local concern. Additionally, even if the FTC Act were applicable, LLC use may prevent liability from being imposed on the landlord. *See* P.F. Collier & Son Corp. v. FTC, 427 F.2d 261, 266 (6th Cir. 1970) (noting that, “absent highly unusual circumstances, the corporate entity will not be disregarded” in the Federal Trade Commission Act context). The *Collier* court then went on to explain that the traditional agency law principles that are discussed in Section III could count as “highly unusual circumstances.” *Id.* *But see* FTC v. E.M.A. Nationwide, Inc., 767 F.3d 611, 636 (6th Cir. 2014) (holding that liability under the FTCA can be extended to individuals who “participated directly in the business entity’s deceptive acts or practices, or had the authority to control them;” and adding that “status as a controlling

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as the Connecticut Unfair Trade Practices Act, has been applied to hold owners liable for failure to maintain their properties.⁹⁹ However, state laws like CUTPA are likely to be unavailing as well. Violations of CUTPA for poor housing maintenance are tied to violations of the housing code.¹⁰⁰ Because a landlord who effectively uses LLCs is deemed not to have violated the housing code, she cannot be held to have violated CUTPA either. Thus, the same evasion issues that result from single-property LLCs once again create an obstacle to full enforcement. Moreover, CUTPA itself has no additional provisions or doctrines that would allow liability to reach a landlord that has evaded the housing code.¹⁰¹

shareholder of a closely-held corporation creates an inference” of such authority).

99. *See, e.g.*, CONN. GEN. STAT. § 42-110a et seq. (CUTPA). CUTPA broadly proscribes “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce,” but then further clarifies that the interpretation of that phrase will be influenced by the interpretation of analogous language in the Federal Trade Commission Act. *Id.* § 42-110b. The rest of the act is mainly concerned with providing for both public and private enforcement.
100. *Conaway v. Prestia*, 464 A.2d 847, 851 (Conn. 1983); *see also* *State v. Acordia, Inc.*, 73 A.3d 711, 729 (Conn. 2013) (explaining that “a CUTPA claim must be consistent with the regulatory principles established by the underlying statutes”). In *Conaway*, tenants brought a class action against a landlord who had failed to obtain certificates of occupancy for his properties in violation of the municipal housing ordinance and consequently state law. 464 A.2d at 849-50. While the certificate of occupancy provision did not explicitly proscribe the receipt of rents without a certificate, the court held that the fact that they were legally required was sufficient under CUTPA to support a damages action. *Id.* at 852-53.
101. The Connecticut Supreme Court has noted that “liability under CUTPA may be extended to an individual who engages in unfair or unscrupulous conduct on behalf of a business entity.” *Joseph Gen. Contracting, Inc. v. Couto*, 119 A.3d 570, 585 (Conn. 2015) (holding liable the sole shareholder of a contracting company who personally engaged in various material misrepresentations and arguable acts of intimidation against one of his businesses’ customers). The *Couto* court concluded that “[i]n order for any individual liability to attach under CUTPA, someone must knowingly or recklessly engage in unfair or unscrupulous acts, as contemplated by the statute, in the conduct of a trade or business.” *Id.* at 588. Even California courts have been unwilling to extend liability in this manner. *See Bradstreet v. Wong*, 75 Cal. Rptr. 3d 253, 267-68 (Ct. App. 2008) (explaining that under California’s version of CUTPA—its Unfair Competition Law—a corporation’s

III. COMMON CONTROL LIABILITY: A POTENTIAL SOLUTION

Housing code enforcement laws should be supplemented by provisions that focus on common ownership of different assets. One approach could be to engage in what is known as “piercing the corporate veil,” which involves a court disregarding the corporate form and holding a corporation’s shareholders personally liable for the debts of the corporation. Courts are extremely reluctant to do this since it would undermine the entire policy of allowing limited liability in the first place. Typically, they will only allow veil piercing when the corporation is essentially a sham: the corporation is undercapitalized, corporate formalities are not observed, and assets are intermingled.¹⁰² Even in the realm of tax enforcement, courts will not pierce the veil unless there has been wrongdoing on the level of fraud.¹⁰³ Application of the common law

liability for disgorgement, restitution, and civil penalties cannot be extended to corporate officers).

102. Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 104-10 (2014).
103. See, e.g., *Morris v. N.Y. State Dep’t of Taxation & Fin.*, 623 N.E.2d 1157, 1160 (N.Y. 1993). In another New York case, a pedestrian injured by a negligently-driven taxi cab attempted to pierce the corporate veil of the taxi cab’s owner. *Walkovszky v. Carlton*, 223 N.E.2d 6 (N.Y. 1966). The taxi cab was owned by a corporation and was the only asset of that corporation. The sole shareholder of that corporation owned a number of other companies, each with assets of just one or two cabs. *Id.* at 7. Each corporation carried the statutorily required minimum amount of liability insurance, which was insufficient to cover judgment in the case. *Id.* at 9. The Court of Appeals held that the corporate veil could not be pierced. *Id.* However, the State ultimately solved this problem by simply increasing the amount of liability insurance per cab each cab company had to hold. See N.Y. COMP. CODES R. & REGS. tit. 11, § 60-1.1(a). Other cities have adopted a similar policy solution for their taxi cab industries. See, e.g., CHICAGO MUN. CODE § 9-112-330(a); SEATTLE MUN. CODE § 6.310.260(A)(2)(f); see also Christopher Drew & Andy Newman, *Taxi Owners Deftly Dodge Claims of Accident Victims*, N.Y. TIMES (May 24, 1998), <http://www.nytimes.com/1998/05/24/nyregion/taxi-owners-deftly-dodge-claims-of-accident-victims.html> [<http://perma.cc/T7FT-F7BL>]. A version of this strategy, which would essentially involve increasing capitalization requirements for each company, could be used to attack the single-property LLC problem. However, this approach would have the downside of increasing the cost of business, even for landlords who maintain their properties well.

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veil piercing doctrine would be cumbersome, and in most cases unsuccessful. Enforcement provisions could be amended to allow for per se veil piercing for all shareholders; but it seems unfair to subject landlords' personal assets to suit in all cases.

A. ERISA's Common Control Rules

A better approach comes from ERISA's common control liability rules. ERISA, or the Employee Retirement Income Security Act, is the primary federal statute governing the regulation of pension plans, retirement benefits, and employee benefits.¹⁰⁴ One of ERISA's major functions was to create the Pension Benefit Guaranty Corporation (PBGC), which insures pensions in case the employer defaults on obligations and the pension fund is unable to pay out promised benefits.¹⁰⁵ It functions in a manner similar to that of the Federal Deposit Insurance Corporation (FDIC). When the PBGC is forced to pay out benefits, it can in turn sue the pension plan's sponsoring employer for the amount by which the plan is underfunded.¹⁰⁶ This system ensures that businesses cannot get out of their pension promises by purposefully defaulting on their obligations. Of course, a company that is defaulting on its pension promises is itself likely to be insolvent.

To remedy this problem, ERISA attaches liability beyond the corporation that actually sponsored the pension plan.¹⁰⁷ The statute states, "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer."¹⁰⁸ This means that when corporations are under common control, one corporation is effectively fully liable for pension obligations of the other corporations. The liability works as it would if the obligation was that corporation's pension. More detail on this system can be found in

104. See 29 U.S.C. §§ 1001-1381.

105. See 29 U.S.C. §§ 1301-81.

106. 29 U.S.C. § 1362.

107. Pension Benefit Guaranty Corp. v. Ouimet Corp., 630 F.2d 4, 12 (1st Cir. 1980).

108. 29 U.S.C. § 1301(b)(1). The provision further states that "[t]he regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of" the Internal Revenue Code of 1986. *Id.*

regulations promulgated by the Treasury Secretary—to which the PBGC refer—at 26 C.F.R. § 1.414(c)-2.¹⁰⁹

The Treasury Regulations establish three types of groupings of trades or businesses under common control. While the term ERISA uses is “control,” the regulations actually focus on ownership instead. They do not, as in the case of the New Haven and Milwaukee housing codes, depend on whether a shareholder or parent corporation is actively exercising control over a business.

The first kind of common control group is a parent-subsidiary group.¹¹⁰ There is one parent company and potentially an unlimited number of subsidiaries. Two or more companies form a parent-subsidiary group when two conditions are met. First, each of the subsidiary companies in a group must have 80% of its stock owned by another company in the group (it can be either the parent company or another subsidiary).¹¹¹ Percentage of ownership is measured in terms of percentage of voting rights. Second, the parent company must own at least 80% of at least one of the subsidiaries.¹¹² If Company A owns 80% of Company B and 80% of Company C, then all three companies form one common control group. The assets of Company C could be used to satisfy the liabilities of Company B, for example. Likewise, if Company A owned 80% of Company B and Company B owned 80% of Company C, all three companies would be part of one common control group.

The second type of common control group is a brother-sister group.¹¹³ This category involves five or fewer individuals, estates, or trusts that own shares in the same companies. There are also two requirements for a brother-sister group. First, the cumulative number of shares possessed by the owners in common (i.e., the five or fewer individuals or entities) must add up to 80% for each company.¹¹⁴ Second, each of the owner’s smallest positions (measured in terms of percentage of voting rights in the

109. 29 C.F.R. § 4001.3(a)(1) makes its definition of common control co-extensive with common control regulations “prescribed under section 414(c) of the [Internal Revenue] Code.” Those relevant Treasury Regulations are at 26 C.F.R. § 1.414(c)-2.

110. 26 C.F.R. § 1.414(c)-2(b).

111. *Id.* §§ 1.414(c)-2(b)(1)(i), 1.414(c)-2(b)(2)(i).

112. *Id.* § 1.414(c)-2(b)(1)(ii).

113. *Id.* § 1.414(c)-2(c).

114. *Id.* § 1.414(c)-2(c)(1)(i).

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company) must together add up to 50% or more.¹¹⁵ If there is a brother-sister group, then the commonly owned companies are treated as one company, but the personal assets of the common owners are still protected by limited liability¹¹⁶. Imagine that Person X owns 30% of Company A and 80% of Company B. Person Y owns 50% of Company A and 20% of Company B. Company A and Company B are a brother-sister group. X and Y cumulatively own 80% of Company A and 100% of Company B. Furthermore, Person X's smallest share as a percentage in either company is 30%, while Person Y's smallest share is 20%, which adds up to 50%. The assets of Company A could be used to satisfy the liabilities of Company B, but the assets of X and Y would remain off limits.¹¹⁷

The third type of common control group is a combined group.¹¹⁸ A combined group is simply a group that is composed of a parent-subsiary group and a brother-sister group. Take the example from above, but add the condition that Company B owns 100% of Company C. Companies A and B would still be in a brother-sister group, while Companies B and C would form a parent-subsiary. Together, Companies A, B, and C would form a combined group.

Despite the evident power and simplicity of these rules, they have not received much attention outside of pension and benefit law. However, they did apparently serve as a partial model for a provision in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) that makes banks under common control liable for losses to the federal Bank Insurance Fund caused by the failure of a sister bank.¹¹⁹ Additionally one commentator has suggested using the ERISA common control rules as a potential basis for proposed reforms to the Equal Access to Justice Act

115. *Id.* § 1.414(c)-2(c)(1)(ii).

116. *See Id.* § 1.414(c)-2(e) (giving examples).

117. Note that the brother-sister rules, if they were applied to taxi cabs, would have allowed the plaintiff in the *Carlton* taxi cab case to fully recover by going after the assets of the other cab companies.

118. *Id.* § 1.414(c)-2(d).

119. Cindy A. Schipani, *Taking it Personally: Shareholder Liability for Corporate Environmental Hazards*, 27 J. CORP. L. 29, 47 n.125 (2001) ("The Employee Retirement Income Security Act of 1974 (ERISA) contains an exception to the rule of limited corporate liability that is virtually identical to the cross-guarantee provision of FIRREA"); *see also id.* at 47 n.124 (explaining the FIRREA provision).

(EAJA).¹²⁰ And they have been cited as support for another proposal to increase the liability of parent companies for human rights violations of subsidiaries.¹²¹ Overall, though, ERISA's common control rules arguably have not gotten the attention they deserve; one positive by-product of this Note can be to raise awareness of their potential applicability to contexts outside of pension and benefit law.

B. Adapting the Common Control Scheme for Housing Code Enforcement

Municipalities should consider adopting an ERISA-like common control scheme for housing code enforcement. Common control would allow for full enforcement of the housing code. Landlords, particularly the sophisticated landlords who would engage in a strategic default, typically own multiple properties. These different properties would form a brother-sister group since they have common ownership. If landlords attempt a strategic default, then the city would be able to sue the other LLCs that the landlords own and foreclose on those properties until their fines are fully paid off. For example, if Milwaukee employed a common control scheme, then the city could just sue one of Sherrena's other LLCs. As each of her LLCs has common ownership, they form a brother-sister group. The city would be able to treat the other LLCs as if the housing code fines ran directly against them, garnishing their bank accounts or foreclosing on their assets. Of course, Sherrena herself would remain personally immune from suit. However, that is likely to not be an issue. Landlords like Sherrena keep the vast majority of their wealth in rental properties. In fact, at one point, despite being worth millions of dollars, Sherrena experiences severe cash flow problems.¹²²

A common control scheme for full housing code enforcement would have important benefits for tenants. It would, as a general rule, incentivize landlords to better maintain their buildings, since their potential exposure

120. Tayler W. Tibbitts, *Fee Shifting: Perspective for EAJA Reformers*, 28 J. L. & POL. 371, 409, 409 n.227 (2013). The availability of attorney fees depends upon whether a party's net worth is below a certain ceiling. The proposal entails using common control rules to prevent corporations from gaming the statute by making their effective net worth look lower than it really is.

121. Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, 72 WASH. & LEE L. REV. 1769, 1855-56 (2015).

122. DESMOND, *supra* note 1, at 157.

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to fines for unmaintained buildings would no longer be capped. Second, it would give tenants greater bargaining power when landlords skimp on maintenance in exchange for letting them fall behind on rent. If the dwelling falls into an excessive state of disrepair, then the tenant could threaten to call the housing inspector should the landlord threaten eviction. Landlords would know that they have much more to fear from a housing inspection, and will be accordingly less likely to abuse their bargaining power. Last, a common control scheme would reduce the number of actual strategic defaults, which means that more housing units would avoid foreclosure and eventual abandonment to the city. This would increase the stock of affordable housing. Furthermore, there is no reason why a municipality could not enact such a policy under its police powers.¹²³

A common control liability scheme also solves many of the problems of an active control-based approach. Liability under a common control scheme would be predictable and easy to prove. The enforcing authority would be able to simply show that fines have attached to one of the buildings and then rely on the ownership records of each corporate entity involved.¹²⁴ This mechanical approach would work better for cash-strapped city governments. It would also reduce the possibilities for evasion that are endemic to an active control scheme. Liability would not depend on whether the landlord is actually delegating management of the property to a third party—something that is presumably harder to prove than just ownership in a company or web of companies. Landlords may try

123. As discussed above, current housing codes already create liability for those beyond the title holder who are not personally culpable for the housing code violation. Enacting common control liability would just involve extending this liability. That said, some states do place restrictions on what a municipality can do when enacting a housing code. For example, while Connecticut does not appear to have any law preventing a municipality from choosing common control liability, the legislature has placed restrictions on the amount of fines a municipality can impose for a single violation. *See* CONN. GEN. STAT. § 7-148(c)(7)(A)(i) (providing for a general grant of power to municipalities to create housing codes); *id.* § 7-148(c)(10)(A) (authorizing municipalities to create monetary penalties for violation of municipal laws); *State v. Rizzo*, No. CR0654952, 2006 WL 3042688, at *3 (Conn. Super. Ct. Oct. 3, 2006) (invalidating a housing code ordinance that sought to exceed this limit). These kinds of restrictions make it infeasible to give a more detailed, general account of the legal and political obstacles any given municipality may face in pursuing common control liability.

124. *See* MACEY, MOLL & HAMILTON, *supra* note 15, at 917 (discussing requirements for ownership records of LLCs).

to work with different investment partners for each of their properties in order to defeat brother-sister group liability, but it would be hard (albeit not impossible) to find enough investors to make evasion feasible. A landlord would keep needing to find different partners to avoid forming multiple brother-sister groups. Additionally, each investment partner would have to be willing to make a substantial investment (i.e., greater than 20%), otherwise their presence in the company would not matter for determining liability. And the landlord would have to do this for *each* property.

Perhaps the most potent argument against a common control liability policy is that it does not go far enough. It still leaves the personal assets of the landlord protected from liability. Why not create, via statute, a per se veil piercing scheme for the housing code that would subject the personal assets of landlords to liability? The problem with per se veil piercing is that it appears to go farther than necessary. It is hornbook corporate law that limited liability, by assuring shareholders that their personal assets are immune from suit, increases investment in a given sector.¹²⁵ Conversely, dispensing with limited liability has the opposite effect. Accordingly, the corporate form should not be disregarded more than necessary. And it seems unnecessary to subject the landlords' personal assets to liability for most cases. Given that the sophisticated landlords who employ a single-property LLC strategy, like Sherrena, are likely to own many other properties as well, it seems that subjecting just those properties to liability is probably sufficient to make sure that the housing code is fully enforced.¹²⁶ Overall, common control liability strikes a better

125. See Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 262 (1967). Of course, one could extend this logic further to also criticize common control liability on the basis that the full housing code enforcement, even if it were limited only to corporate assets would go too far. The fear would be that greater fines would disincentivize landlords from investing in affordable housing in low-income communities. However, this is really a disagreement with the level of housing code fines and the level of maintenance the code requires. Perhaps many housing codes are too tough (or perhaps not tough enough), but the degree of actual liability should not depend on if landlords have creatively structured their holdings.

126. Unfortunately, any discussion of this particular issue is rendered somewhat speculative by the fact that LLCs can be used to shield the identity of a property's owner from the public. See Badger & Bui, *supra* note 1 (noting that LLC ownership records typically are not available to the public). This can make it hard for any private researcher to find out how many properties landlords tend to own. The government, though, does have the ownership records, and could use them when enforcing the housing code.

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balance than a per se veil piercing approach. It would still allow landlords to avail themselves of the corporate form but would dispense with the legal fiction that each property is a separate and distinct business.

However, if a municipality implements this approach, it should do so with two modifications. First, the measurement of percentage ownership should be based on percentage of profits rather than percentage of votes.¹²⁷ If it were based on votes, then landlords could nominally assign voting rights to family and close friends in order to avoid a common control group. Focusing on who is actually receiving the cash from these properties avoids this problem. It is one thing for a landlord to let the properties be in another person's name, but it is another to let that person keep the bulk of the profits. Second, only corporations that rent real estate, both commercial and residential, should be eligible to be part of a common control group. As noted above, the advantage of the enforcement scheme is that it would recognize each one of a landlord's properties as a part of a single business. Limiting common control liability to businesses that have real estate leasing components should still provide a sufficient pool of assets for full housing code enforcement.

CONCLUSION

Increasingly sophisticated landlords have utilized single-property LLCs to insulate themselves from housing code enforcement. This trend has significant consequences for low-income tenants. The incentive for landlords to maintain their buildings is diminished. It also can allow landlords to obtain excessive bargaining power when renting neglected units. Then, when the property accumulates too many fines, landlords can simply walk away from the buildings. These strategic defaults have ripple effects throughout a neighborhood and city. Typical housing code enforcement provisions, as well as criminal and consumer law, do not sufficiently address this problem. A policy scheme inspired by ERISA's common control liability mechanism could go a long way toward solving this problem and providing for full housing code enforcement.

127. Note that such information would be part of ownership records, since ownership in an LLC is not determined solely by voting rights but also by the percent of the LLC's proceeds that a person receives. *See* MACEY, MOLL & HAMILTON, *supra* note 15, at 996 (discussing "financial rights" and "management rights" of LLC owners).